88-691

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

SHARON LEA GRINTER
Plaintiff/Appellant/Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor/Appellant/Respondent

VERSUS

PETROLEUM OPERATION SUPPORT SERVICE, INC., ET AL
Defendant/Appellee/Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that its application for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit presents the following questions for review:

1. Whether the decision by the United States Court of Appeals for the Fifth Circuit creates an irreconcilable and direct conflict with the United States Court of Appeals for the Eleventh Circuit, decision in *Lykins v. Pointer, Inc.*, 725 F.2d. 645 (11th Cir. 1984), and, whether this conflict was considered and recognized.

2. Whether a United States District Court has any discretion to retain jurisdiction over a 'pendent' state-law claim against a party over which the Court would not otherwise have jurisdiction, where the claim to which it must pend is initially dismissed for lack of jurisdiction. Stated another way the issue is, whether a United States District Court is required to dismiss state-law claims against parties over whom it has no independent basis for jurisdiction, where the only basis for 'pendent' party jurisdiction is an inchoate Federal Torts Claims Act claim which has been dismissed for lack of jurisdiction for failure to follow administrative procedures.

3. Whether the United States Court of Appeals for the Fifth Circuit has improperly expanded 'federal question' jurisdiction beyond the limits of Article III of the Constitution of the United States.

4. Whether the United States Court of Appeals for the Fifth Circuit ignored statutorily imposed jurisdictional prerequisites under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2675(a), in reaching the question of the 'substantiality' of a federal claim and determining that the district court had the discretion to retain the 'pendent' state-law claim over a non-federal and non-diverse party.

5. Whether the United States Court of Appeals for the Fifth Circuit erred in failing to distinguish between federal claims reviewed for substantiality over which *there is jurisdiction*, and federal claims over which *there is no jurisdiction* due to failure to comply with statutorily-imposed jurisdictional prerequisites such as those contained within the Federal Torts Claims Act, 28 U.S.C. Sections 1346(b) and 2675(a).

LIST OF PARTIES AND CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order to allow the Justices of this Honorable Court to evaluate possible disqualification or recusal.

1. Sharon Lea Grinter, Plaintiff/Appellant/Respondent;
2. Theordore M. Haik, Jr. and the Law Offices of Haik and Minvielle, Counsel for Plaintiff/Appellant/Respondent;
3. Petroleum Operations Support Service, Inc. (POSSI), Defendant/Appellee/Petitioner, and its parent company, Kaneb Services, Inc.;
4. Laurence E. Larmann and the Law Offices of Hailey, McNamara, Hall, Larmann & Papale, Counsel for Defendant/Appellee/Petitioner;
5. National Union Fire Insurance Company, Intervenor/Appellant/Respondent;
6. The Law Offices of Jeansonne and Briney, Counsel for Intervenor/Appellant/Respondent;
7. Parsons-Gilbane, a Joint Venture;
8. The Law Offices of McGlinchey, Stafford, Mintz, Cellini and Lang;
9. Frees Construction Company;
10. Robert W. Daigle, Esq.;
11. Jeanminette Fence Company;
12. The Law Firm of Allen, Gooch, Bourgeois, Breaux

and Robison;

13. The United States of America, Department of Energy and the United States Attorney's Office, and the Solicitor General.

14. Fenix & Scisson, Inc.

15. Crest Engineering, Inc.

16. Richard Chozen, Esq.

17. Home Insurance Company

Pursuant to Supreme Court Rule 21.6(b), the parties to the proceeding in the court whose judgment is sought to be reviewed are numbers 1, 3 and 5 above.

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IN THE
SUPREME COURT OF THE UNITED STATES

SHARON LEA GRINTER
Plaintiff/Appellant/Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor/Appellant/Respondent

VERSUS

PETROLEUM OPERATION SUPPORT
SERVICE, INC., ET AL
Defendant/Appellee/Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REFERENCES TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The original ruling, written reasons and judgment of the United States District Court for the Western District of Louisiana, along with its order granting a reconsideration of the issues and subsequent ruling thereon, are contained verbatim in the Appendices. Also contained in the Appendices, verbatim, are the original ruling of the United States Court of Appeals for the Fifth Circuit, and the denial of the Petition for Rehearing. Finally, the Appendices also contain the ruling of the district court on remand.

STATEMENT OR GROUNDS UPON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

The decree sought to be reviewed is the judgment of the

United States Court of Appeals for the Fifth Circuit dated June 9, 1988, bearing No. 87-4338. The Petitioner filed a Petition for Rehearing which was denied by the Court on July 15, 1988. It is submitted that this case is within the discretionary jurisdiction of the Court pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The following constitutional provisions and statutes are involved in these proceedings and are reproduced verbatim in the Appendices:

1. Article III of the Constitution of the United States;
2. 28 U.S.C. Section 1331;
3. The Federal Torts Claims Act, 28 U.S.C. Sections 1346(b) and 2675(a).

STATEMENT OF THE CASE

Sharon Lea Grinter filed suit on May 11, 1984, alleging she sustained a severe back injury on May 12, 1983, while on duty as a security guard at a Strategic Petroleum Reserve Site. This site was owned by the United States Department of Energy (DOE) and managed by Petitioner, Petroleum Operation Support Service, Inc. (POSSI) at the time of her alleged injury. Plaintiff sued the DOE and POSSI, among others, basing jurisdiction against the DOE under the Federal Torts Claims Act, 28 U.S.C. Sections 1346(b) and 2675(a) and jurisdiction against POSSI on diversity of citizenship, 28 U.S.C. Section 1332.

Plaintiff's claims against the United States were dismissed for lack of subject matter jurisdiction, due to a failure to exhaust administrative remedies as required by the Federal Torts Claims Act, 28 U.S.C. Sections 1346(b) and 2675(a). The district court subsequently dismissed plaintiff's suit against POSSI and the remaining defendants based upon lack of com-

plete diversity between plaintiff and POSSI. In connection with this ruling, the district court held that it was without the power and discretion to exercise pendent party jurisdiction over POSSI grounded upon the absence of a federal claim to which plaintiff's state-law claim could pend.

On reconsideration, the district court reinstated plaintiff's claims against all defendants with the exception of POSSI again holding that it was without the power and discretion to retain jurisdiction over the state law claim against POSSI, a defendant over whom no independent basis for jurisdiction existed.

On June 9, 1988, the United States Court of Appeals for the Fifth Circuit affirmed that portion of the district court's ruling holding that there was no diversity between POSSI and plaintiff. The Fifth Circuit vacated and remanded that portion of the district court decision concerning pendent party jurisdiction over the state-law claim against POSSI and held that the district court was required to exercise its discretion in this regard despite dismissal of the federal claim for lack of jurisdiction.

Petitioner moved for a rehearing, which was denied by the Fifth Circuit on July 15, 1988. On remand, the district court declined to retain jurisdiction over the 'pendent' state-law claim against POSSI and dismissed the claim without prejudice. Plaintiff, in the interim, filed a state court action. POSSI has affirmatively pleaded the applicable statute of limitations as a defense to the state court action.

POSSI seeks a Writ of Certiorari for the reason that the Fifth Circuit decision has created an irreconcilable and direct conflict with the decision of the Eleventh Circuit in *Lykins v. Pointer, Inc.*, 725 F. 2d 645 (11th Cir. 1984) which held that the want of a federal claim under the Federal Torts Claims Act due to a lack of subject matter jurisdiction renders pendent party jurisdiction impossible. A writ is also sought since the decision by the Fifth Circuit has impermissibly expanded Article

III of the Constitution of the United States and federal question jurisdiction as provided in 28 U.S.C. Section 1331. Petitioner submits that the Fifth Circuit improperly applied the rulings of this Court and seeks the issuance of a Writ of Certiorari on the questions presented for review to the Court of Appeals for the Fifth Circuit and a limited reversal of the decision of the Fifth Circuit as it pertains to the discretion of the district court under the circumstances presented. Petitioner submits that the resolution of the issues presented for review will be dispositive of the statute of limitations defense raised in state court by POSSI.

ARGUMENT

Lacking diversity jurisdiction over respondent, plaintiff attempted to invoke 'federal question' jurisdiction pursuant to 28 U.S.C. Section 1331[1], and the doctrine of pendent party jurisdiction. Plaintiff cited and relied upon the invocation in her complaint of the Federal Torts Claims Act (FTCA), 28 U.S.C. Section 2675[2]. This FTCA claim was dismissed by the district court for failure to exhaust administrative remedies pursuant to 28 U.S.C. Section 2675(a). This failure to exhaust administrative remedies is a *jurisdictional* defect which results in a dismissal *sua sponte*.[3]

As to POSSI, against whom only state law claims were asserted and as to whom no independent basis for federal jurisdiction existed, plaintiff asserted the theory of pendent party jurisdiction should be applied. The theory of pendent party jurisdiction emanates from this Court's decision in *Aldinger*

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1. Text of 28 U.S.C. Section 1331 is reproduced in Appendix G.

2. Text of 28 U.S.C. Section 2675 is reproduced in Appendix I.

3. U.S. v. Burzynski Cancer Research Institute, 819 F. 2d 1301 (5th Cir. 1987); Reynolds v. U.S., 748 F. 2d 291 (5th Cir. 1984); Gregory v. Mitchell, 634 F. 2d 205 (5th Cir. 1981); McWhirter Distributing Company, Inc. v. Texaco, Inc., 668 F. 2d 511 (Temporary Emergency Court of Appeals, 1981).

v. Howard, 427 U.S. 1, 96 S. Ct. 2413, 49 L.Ed. 2d 276 (1976). While allowing the jurisdictional pending of a state-law claim and party to a federal civil rights claim, *Aldinger* cautioned that the exercise of pendent party jurisdiction is limited by Article III of the Constitution and federal statutes.

> Two observations suffice for the disposition of the type of case before us. If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Article III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence. 427 U.S. at 18, 96 S.Ct. at 2422.

The facts of this lawsuit present the precise type of case cautioned against by *Aldinger*. Article III of the Constitution and 28 U.S.C. Section 1331 require that state-law claims pend to a claim arising under a law of the United States *over which a federal court has jurisdiction*.

Without jurisdiction over a claim arising under the laws of the United States, the mandates of Article III of the Constitution and 28 U.S.C. Section 1331 are exceeded.

This conclusion was reached by the United States Court of Appeals for the Eleventh Circuit in the decision of Lykins v. Pointer, Inc., 725 F.2d 645 (11th Cir. 1984).

> . . .[I]f the court concludes that it lacks subject matter jurisdiction under 28 U.S.C. Sections 1346(b) and 2675, the want of a federal claim would render pendent party jurisdiction impossible. 725 F.2d at 649.

See also *Cooley v. U.S. Dept. of Housing & Urban Development*, 680 F. Supp. 296 (N.D. of Illinois, E.D. 1988).

In determining that the district court had the discretion to retain or dismiss the state-law claims against POSSI, the United States Court of Appeals for the Fifth Circuit disregarded the limits of Article III of the Constitution of the United States and impermissibly expanded the scope of federal question jurisdiction. Further, the Fifth Circuit placed itself in direct conflict with that decision of the Eleventh Circuit Court of Appeals in *Lykins*, supra.

The Fifth Circuit Court of Appeals ignored the crucial distinction between the dismissal of a federal question claim which must be reviewed for substantiality but over which *there is jurisdiction*, and the dismissal of a federal claim over which *there is never jurisdiction due* to a failure to comply with statutorily-imposed jurisdictional prerequisites such as those contained within the Federal Torts Claims Act, 28 U.S.C. Sections 1346(b) and 2675(a).

Respondent does not contest that federal courts are vested with discretion to entertain certain pendent party claims.[4]

However, in those instances, the district court has jurisdiction over the federal question at some point in the proceedings, which then enables the district court to enter a dismissal of the federal claim on the merits. Dismissal in such instances are not mandated by statute due to jurisdictional defects. This circumstance must be distinguished, for the purpose of Article III of the Constitution, from the situation of the instant case, where the district court *never* had jurisdiction of any federal claim. The Eleventh Circuit Court of Appeals in *Lykins* recognized this distinction in a case which, as here, involved

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4. *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F. 2d 129 (5th Cir. 1987); *Breen v. Centex Corp.*, 695 F.2d 907 (5th Cir. 1983); *Gregory v. Mitchell*, 634 F.2d 205 (5th Cir. 1981); *Tinker v. DeMaria Porche Audi, Inc.*, 632 F. 2d 520 (5th Cir. 1980); *In Re Carter*, 618 F. 2d 1093 (5th Cir. 1980); *Hudak v. Economic Research and Analyst, Inc.*, 499 F.2d 996 (5th Cir. 1974).

the Federal Torts Claims Act. Petitioner respectfully takes issue with the decision of the Fifth Circuit Court of Appeals which found that discretion remained in the district court to retain a 'pendent' state-law claim over a non-federal and non-diverse party.

In reaching its decision, the United States Court of Appeals for the Fifth Circuit erroneously applied the jurisdictional test of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). The *Bell* Court noted that where the complaint is drawn so as to seek recovery directly under the Constitution or laws of the United States, a federal court, but for two possible exceptions, must entertain the suit:

> The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

327 U.S. at 682, 66 S.Ct. at 776.

The Fifth Circuit relied upon *Bell* in examining whether or not plaintiff's complaint on its face stated a non-frivolous FTCA claim and presented a substantial federal question.[5]

Petitioner respectfully submits that the question of substantiality should never have been reached by the Fifth Circuit since the Federal Torts Claims Act statute required a *jurisdictional* dismissal in the first instance. A *jursidictional* dismissal under the FTCA pretermits the need for a jurisdictional review under Bell.

Bell and its progeny are distinguishable from those cases brought under the FTCA. Non-FTCA plaintiffs may nominally set forth a Constitutional or federal statutory claim on the

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5. The text of the Fifth Circuit Opinion is reproduced verbatim in Appendix C.

face of a complaint so as to invoke federal question jurisdiction. The district court is then required to review the claim for substantiality and determine whether or not the claims should be dismissed on jurisdictional grounds or on the merits.

The applicable Federal Tort Claims Act statutes, 28 U.S.C. Sections 1346(b) and 2675(a), and the cases interpreting them, set forth affirmatively and without question the rigid rule that invocation of the statute is not enough to justify the exercise of federal jurisdiction and any failure to comply with the requirements of the statutes results in a *jurisdictional* dismissal. The merits of an FTCA claim and the question of 'substantiality' are never reached in such cases. Petitioner submits therefore that 'substantiality' alone is not enough to support a federal question claim arising under the Federal Torts Claims Act. The consequences of failure to comply with the requirement of exhaustion of administrative remedies is dismissal. Therefore, the reliance upon 'substantiality' alone by the Fifth Circuit constitutes an impermissible expansion of federal question jurisdiction beyond the limits of Article III of the Constitution and that articulated by the *Aldinger* Court.

Petitioner submits that without the existence of a federal question claim properly before the Court, pendent party jurisdiction cannot exist. The *jurisdictional* dismissal of an FTCA claim eliminated any claims to which the state-law claims against a non-diverse and non-federal party could pend. The Fifth Circuit, in essence, omitted a jurisdictional hurdle in plaintiff's race to federal court. The implication of the Fifth Circuit decision is that by simply invoking the FTCA, a plaintiff may obtain jurisdiction over a party which would otherwise not be amenable to suit in federal court. By allowing the district court the discretion to retain such state law claims, despite the lack of a jurisdictional base, the Fifth Circuit has expanded the limits of Article III of the Constitution of the United States and opened the flood gates to federal court. As the *Aldinger* court stated:

> . . .[T]he addition of a completely new party would run counter to the well-established principle that *federal courts*, as opposed to state trial courts of general jurisdiction, *are courts of limited jurisdiction marked out by Congress.* 427 U.S. 15, 96 S.Ct. 2420. (emphasis supplied).

Petitioner respectfully submits that the result of the Fifth Circuit decision in the instant case is diametrically opposed to this principle.

CONCLUSION

The decision by the United States Court of Appeals for the Fifth Circuit in the instant case created an irreconcilable and direct conflict with the United States Court of Appeals for the Eleventh Circuit decision in *Lykins v. Pointer, Inc.*, 725 F.2d 645 (11th Cir. 1984). This conflict was not considered or recognized in the Fifth Circuit.

By holding that a United States District Court retains the discretion to accept or reject pendent party jurisdiction of 'pendent' state-law claims against parties over whom it would otherwise have no independent basis for jurisdiction, the Fifth Circuit impermissibly expanded the limits of Article III of the Constitution of the United States and disregarded applicable decisions of this Court and statutory restrictions on federal question jurisdiction.

The Fifth Circuit erroneously applied the jurisdictional test of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) in reaching the question of 'substantiality' of an inchoate Federal Torts Claims Act claim which had already been jurisdictionally dismissed for failure to exhaust administrative remedies.

Petitioner respectfully requests issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Cir-

cuit reversing that portion of its decision allowing the district court the discretion to retain jurisdiction over a 'pendent' state-law claim against POSSI, a non-diverse and non-federal defendant. Petitioner submits that no discretion remained in the district court to exercise pendent party jurisdiction over POSSI once the federal FTCA claim against the DOE had been jurisdictionally dismissed.

Respectfully submitted,

HAILEY, McNAMARA, HALL, LARMANN & PAPALE

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed to all counsel of record by deposit in the United States mail, postage prepaid and properly addressed.

Metairie, Louisiana, this _____ day of October, 1988.

_____

LAURENCE E. LARMANN

APPENDIX "A"

SHARON LEA GRINTER,

PLAINTIFF

VERSUS

UNITED STATES GOVERNMENT, ET AL,
DEFENDANT

NO. 84-1278 SECTION "O"

United States District Court
Western District of Louisiana
Lafayette-Opelousas

January 26, 1987

Now before the court is a motion to dismiss filed by defendant, Petroleum Operations and Support Services, Inc. ("POSSI"). In this motion, POSSI claims that its principal place of business at the time this action commenced was in Louisiana, making it a citizen of Louisiana for diversity jurisdiction purposes. Since the plaintiff's claims against the United States Government have been dismissed, POSSI argues because it is a citizen of the same state as the plaintiff, this court lacks subject matter jurisdiction and must dismiss the entire case, since it is an indispensable party.

Plaintiff filed this suit on May 11, 1984, basing jurisdiction on the presence of a federal question and diversity. The federal question was naming the United States Government as a defendant under the Federal Tort Claims Act. Plaintiff also claimed diversity existed, as she was a resident of Louisiana and none of the other named defendants were considered citizens of Louisiana. In September 1985 plaintiff's claims against the United States were dismissed for lack of subject matter jurisdic-

tion. At this point, diversity jurisdiction was the sole basis for this court's subject matter jurisdiction over the case. In May, 1986, POSSI filed this motion, claiming its principal place of business in May of 1984 was in Louisiana, making POSSI a citizen of Louisiana for diversity purposes. The parties were given extra time to conduct discovery on this very important issue and now the court faces the issue.

At the time of the filing, POSSI was a subsidiary of Kaneb Services, Inc., a Houston-based conglomerate which held a wide variety of interests in the energy business. Kaneb held 83% of the stock of POSSI, with another corporation, Presearch, Inc., holding the remaining 17%. In May of 1984 the composition of POSSI's board of directors was as follows:

Walter Heckelman, Chairman, Houston, Texas;
Michael Shoup, C.E.O. of Kaneb, Houston, Texas;
Robert Rose, Exec. Vice President of Kaneb, Houston, Texas;
William Oller, President of POSSI, Kenner, LA;
Lynn Gollobin, President of Presearch, Washington, D.C.

POSSI was created to seek out and obtain contracts with the Department of Energy for the management of the sites of the strategic petroleum reserves which were established by the United States Government. POSSI was awarded the contract for management of all SPR sites. In 1983, two years later, its corporate office was move to Metairie, Louisiana, in accordance with the SPR contract, which required POSSI to establish a project manager in the New Orleans area. POSSI managed seven sites for the Department of Energy, five of which were in Louisiana. POSSI also managed some smaller sites located throughout the country for the Department of Defense. In May of 1984, the majority of POSSI's employees lived and worked in Louisiana.

POSSI has produced affidavits of Mr. Rose and Craig Carrier showing the majority of POSSI's operations in May of 1984 were conducted in Louisiana and all SPR operations were controlled and directed from the Metairie office, as required by the DOE contract.

Plaintiff relies on the relationship between Kaneb and POSSI to prove that POSSI was, in reality, "run" from the Kaneb offices in Houston. Through depositions and affidavits, plaintiff has been able to show:

1. Marketing functions for POSSI were performed by PLT Engineering, another Kaneb subsidiary in Houston.

2. Accounting services for the Dept. of Defense contracts were performed in Houston.

3. Payroll records were calculated in Metairie, transmitted through a Houston computer, and paid from a Louisiana bank account.

4. Most insurance and pension benefits were handled through Kaneb in Houston.

5. Legal services were provided from the Houston office of Kaneb.

Plaintiff also asserts the inter-relationship of POSSI-Kaneb personnel shows POSSI was directed from Houston. By affidavit, Mr. Oller, President of POSSI, testified that all major strategic and top level financial, managerial and personnel decisions were made by Mr. Shoup, Chief Executive Officer of Kaneb and a member of the board of directors for POSSI, who operated out of Houston.

The plaintiff has the burden of proving diversity jurisdic-

tion exists. *Village Fair Shopping Center v. Sam Broadhead Trust*, 588 F.2d 431 (5th Cir. 1979). To meet this burden, plaintiff relies on the case of *Toms v. Country Quality Meats, Inc.*, 610 F. 2d 313 (5th Cir. 1980). In Toms, the defendant corporation was one of sixty different corporations created and managed by one parent corporation located in Texas. The plaintiff had purchased some allegedly contaminated meat at the defendant's store in Georgia, where all of the defendant's contact with the public and day-to-day operations occurred. The Fifth Circuit applied the "total activity" test and found the defendant's principal place of business to be in Texas because the activity which occurred in Texas was more significant because the defendant corporation was "essentially run from there." The court found:

> [The parent corporation] had the power to remove employees from the smaller corporation to its own payroll; performed all legal work for the sales corporations; formulated some aspects of business policy, including furnishing a list of outlets from whom the small corporations could buy their meat; and had all sales reports, time cards and payroll sheets mailed to them. Insurance for the sales corporations were carried through an umbrella/blanket policy obtained by B&W. Initial operating capital was obtained at least partially through low interest loans from B&W.

610 F.2d at 315.

Many of these same factors are found in the relationship between Kaneb and POSSI. POSSI argues the facts in *Toms* indicate the parent company was much more involved in the day-to-day running of the defendant corporation than in this situation. While the top Georgia employee in *Toms* "wore an apron", meaning he was nothing more than a butcher, POSSI argues Mr. Oller in Metairie had "almost absolute authority

as far as running the POSSI operations and day-to-day activity was concerned.''

The general rule in this situation is that a subsidiary corporation has its own principal place of business for purposes of diversity jurisdiction, unless it is merely an ''alter ego' or agent of the parent corporation. *Burnside v. Sanders Associates, Inc.*, 507 F. Supp. 165 (N.D. Tex. 1980); aff'd. 643 F.2d 389 (5th Cir. 1980); Wright, Miller & Cooper, *Federal Practice and Procedure*, Section 3625 (1984). In *Burnside*, the plaintiff also tried to show the defendant subsidiary corporation had the same citizenship of its parent corporation. The court looked to the degree of control, much as the court in *Toms* had, to determine if the defendant was ''an independent entity with significant autonomy.'' In finding the plaintiff did not sufficiently prove an agency relationship between the parent and subsidiary corporations, the court held the relationship of the parent to the subsidiary was ''to give advice and guidance on the policy level and to help with equity financing. [The parent corporation had] little, if anything, to do with the day-to-day operations of [the subsidiary].'' 507 F. Supp. at 168.

The issues in the case before the court are similar to the issues presented in *Lurie Company v. Loew's San Francisco Hotel Corporation*, 315 F. Supp. 405 (N.D. Cal. 1970). In this earlier case, the court formulated the same test as used by the Fifth Circuit, combining the ''nerve center'' test and the ''place of activities'' test into one factual determination by weighing the activities and formulation of overall policy in the home office of the parent corporation with the ''day-to-day'' activities conducted at the place of operations.

This court finds the plaintiff has not proven the significance of POSSI's operations in Louisiana, both in the Metairie office and the five SPR sites, are outweighed by the control activities originating from the Houston office of Kaneb. The facts presented by the plaintiff show POSSI was only a subsidiary

of Kaneb; it clearly is not the agent or "alter ego" of its parent corporation. The affidavits of Mr. Oller and Mr. Rose indicate that Mr. Oller, as President of POSSI, was vested with significant authority and discharged the functions customarily assigned to corporate offices. Mr. Oller, like any officer, had to answer to POSSI's board of directors, but this does not justify the imputation to POSSI of Kaneb's principal place of business for the purpose of determining POSSI's citizenship. At the time this complaint was filed, POSSI's principal place of business was in Louisiana and, therefore, it is considered to be a citizen of the State of Louisiana.

Having decided that POSSI is a citizen of Louisiana and that diversity in this case is imperfect, the court must now decide whether it can or should exercise its pendent jurisdiction.

The general rule established by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) is that if prior to trial the federal claims are dismissed, the court should also dismiss the pendent state law claims:

> Needless decisions of state law should be awarded, both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Gibbs, 383 U.S. at 726.

This general rule is not absolute, however. In *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F. 2d 1295 (5th Cir. 1983), Judge Brown provides a scholarly review of the law of pendent jurisdiction when the federal claims are dismissed prior to trial. The court concluded that a federal court may exercise pendent jurisdiction when valid considerations outweigh the

theoretical limits of pendent jurisdiction:

> We, too, have indicated our reluctance to take an unbending approach to pendent jurisdiction questions for fear that such conceptual rigor would achieve undesirable ends and ensconce valid considerations of judicial economy, convenience, and fairness to litigants behind a suffocating veil.

698 F. 2d at 1319.

At this stage of the proceedings, the court feels the three factors of judicial economy, convenience and fairness to the parties would certainly be furthered by the exercise of its pendent jurisdiction. The insurmountable obstacle the court faces, however, is the lack of any federal question jurisdiction to which plaintiff's state cause of action might pend. When this court dismissed the plaintiff's claims against the United States Government in 1985, it did so because the court lacked subject matter jurisdiction based on the plaintiff's failure to pursue administrative remedies as required by 28 U.S.C. Section 2675. *See, Reynolds v. United States,* 748 F.2d 291 (5th Cir. 1984). POSSI and the other defendants argue persuasively that because no subject matter jurisdiction ever existed, the court does not have the discretion to exercise its pendent jurisdiction. The case cited by the defendants, *Lykins v. Pointer, Inc.*, 725 F. 2d 645 (11th Cir. 1984), unambiguously supports their argument:

> Of course, if the court concludes that it lacks subject matter jurisdiction under 28 U.S.C. Sections 1346(b) and 2675, the want of a federal claim would render pendent party jurisdiction impossible.

725 F.2d at 649.

The Fifth Circuit has also provided similar guidance in the case of *Taggart Corp. v. Life & Health Benefits Administra-*

tion, Inc., 617 F.2d 1208 (5th Cir. 1980). In this case, the district court found it lacked subject matter jurisdiction under ERISA, 29 U.S.C. Section 1001 et seq. The Fifth Circuit affirmed the district court's dismissal of the plaintiff's pendent state law claims: 'Federal subject matter jurisdiction thus being absent, the district court properly dismissed appellants' pendent claims as well.' 617 F.2d at 1212. Even though the court in *Taggart* didn't state whether or not the district court had discretion, this court finds the logic of *Lykins* persuasive. Because this court never had subject matter jurisdiction in this case, it does not have the option or discretion to exercise its pendent jurisdiction.

Under Fed. R. Civ. P. 21, this court may dismiss the claims against POSSI in order to preserve its subject matter jurisdiction, if a party is not considered indispensable within the meaning of Fed. R. Civ. P. 19. *Ray v. Bird*, 519 F.2d 1081 (5th Cir. 1975).

In this case, POSSI, as maintenance contractor of the SPR site at which the plaintiff was injured, is considered the legal custodian of the fence plaintiff alleges caused her injuries. All of the evidence indicates POSSI may be liable under theories of negligence and strict liability as a result of its role as contractor. POSSI may be the only party in this litigation which owed the plaintiff the duty to maintain the fence in a safe manner. POSSI is an indispensable party to this litigation and the court cannot dismiss POSSI without dismissing the entire case. Fed. R. Civ. P. 19; *Mouton v. Fenix & Scisson, Inc.*, C.A. #84-1803 (W.D. La. 1984). The court realizes the harshness of this decision considering the age of this case and the timing of this motion. Whether or not diversity exists should have been decided long before now, but a federal court is powerless to decide a case over which it never had subject matter jurisdiction.

For the above stated reasons, the Motion to Dismiss Complaint filed by defendant, Petroleum Operations and Support

Services, Inc. is GRANTED.

IT IS ORDERED this action be DISMISSED without prejudice, each party to bear its costs. Counsel for mover will submit a judgment for the court's approval within ten (10) days.

Opelousas, Louisiana, January 17, 1987.

s/John M. Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

JUDGMENT

This action came on for hearing before the Court, Honorable John M. Shaw, District Judge, presiding, based on a Motion to Dismiss brought by defendant Petroleum Operations Support Services, Inc. The issues having been duly heard and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED, that the above captioned matter be and the same is hereby dismissed, without prejudice, as to all claims between all parties, each party to bear its own costs.

Dated at Opelousas, Louisiana, this _____ day of _____, 1987.

_____

CLERK OF COURT

Approved, this 26th day of January, 1987.

s/John M. Shaw

_____

UNITED STATES DISTRICT JUDGE

APPENDIX "B"

SHARON LEA GRINTER,

PLAINTIFF

VERSUS

UNITED STATES GOVERNMENT DEPARTMENT OF ENERGY, ET AL

DEFENDANT

No. 84-1278 DIVISION "O"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

MARCH 17, 1987

O R D E R

Plaintiff having moved the court to reconsider its order of January 16, 1987 dismissing the Complaint, and it appearing to the court that a reconsideration of the issue of pendent party jurisdiction and of diversity of citizenship is warranted by the severe consequences of its order dismissing the Complaint and that the said Motion should be granted, it is

ORDERED that a hearing be held on the 17th day of March, 1987.

Dated: January 30, 1987

/s/John M. Shaw

UNITED STATES DISTRICT JUDGE

RULING

Now before the court is a motion for reconsideration filed by the plaintiff. By this motion, plaintiff urges the court to review its ruling of January 16, 1987 which held that defendant, Petroleum Operations and Support Services, Inc. (POSSI) was a resident of the State of Louisiana at the time plaintiff filed this suit, thus destroying this court's subject matter jurisdiction. This court also ruled that it could not exercise its pendent jurisdiction and had to dismiss the entire action because the non-diverse POSSI was considered an indispensable party under Fed. R. Civ. P. 19. Plaintiff seeks reconsideration of all of the issues decided in the prior ruling.

Plaintiff does not present any new factual evidence nor does she cite any new legal authority in the arguments presents on the issues of diversity and pendent jurisdiction. Therefore, the court affirms its holding on these two issues: POSSI was a Louisiana resident at the time of filing and the court may not exercise pendent party jurisdiction to maintain subject matter jurisdiction in this case. The only way for this court to maintain subject matter jurisdiction is to dismiss POSSI as a defendant. Plaintiff has cited new authorities on the issue of whether POSSI is an indispensable party to this case and the court will re-examine its ruling on this issue.

Generally, joint tort-feasors or joint obligors are not considered indispensable parties to a case in federal court. *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir. 1983); *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Samaha v. Presbyterian Hosp. in City of New York*, 757 F.2d 529 (2nd Cir. 1985). This is based on the principle that a plaintiff may fully recover from one joint tort-feasor. In Louisiana, this relationship is recognized as solidary obligors, even though their concurrent negligence results from different acts or breaches of different duties. *Pearson v. Hartford Accident and Indemnity Co.*, 281 So. 2d 724 (La. 1973). In this case, plain-

tiff claims Parsons- Gilbane is responsible as designer/installer of the fence gate and POSSI as the entity with control of the gate under LSA-C.C. Art. 2317. Though there is evidence absolving Parons-Gilbane from fault, plaintiff has alleged and shown sufficient facts to characterize Parsons-Gilbane as a possible joint tort-feasor with POSSI. *Duplechain v. Clausing Machine Tools*, 420 So.2d 720 (La. App. 4th Cir. 1982). The court will therefore apply the rule that joint tort-feasors are not indispensable parties within the meaning of Fed. R. Civ. P. 19 and will rule that POSSI is not a necessary party to this suit.

This court was mistaken in its earlier reliance on the confusing case of *Ray v. Bird*, 519 F.2d 1081 (5th Cir. 1975). Though the court dismissed the entire case in that tort action after one of the defendants was found to be non-diverse, the court did characterize the other joint tort-feasor defendant as "non-indispensable." This court interprets Ray to mean that the plaintiff should have moved to dismiss the non-diverse, dispensable Melton Truck Lines, Inc. to preserve the district's court jurisdiction over the entire case. When the plaintiff failed to do so, the court of appeals ruled that the district court's failure to dismiss Melton on its own motion (although the district court could have done so) was not reversible error. This court does not interpret Ray to hold that joint tort-feasors are indispensable parties.

For the reasons stated above, the motion for reconsideration filed by the plaintiff is DENIED in part and GRANTED in part.

IT IS ORDERED that defendant, Petroleum Operations and Support Services, Inc., be DISMISSED from this action without prejudice.

IT IS ORDERED that the part of this court's ruling dismissing plaintiff's action against the remaining defendant be VACATED and the plaintiff's case be REINSTATED.

A pre-trial conference is scheduled for July 9, 1987 at 1:30 p.m. Trial of this matter is scheduled to commence on July 27, 1987 at 9:30 a.m. All deadlines are reset in accordance with the attached Standing Order.

Opelousas, Louisiana, April 2, 1987.

/s/JOHN M. SHAW

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

Appeal from the United States District Court
For the Western District of Louisiana

Before GARZA, REAVLEY and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Appellant Sharon Lea Grinter appeals from a final judgment dismissing for lack of federal jurisdiction her suit against Petroleum Operation Support Services Inc. (POSSI). We affirm in part, vacate in part, and remand.

In 1981, the United States Department of Energy (DOE) awarded defendant POSSI a contract to maintain and manage Strategic Petroleum Reserve (SPR) sites in Louisiana. POSSI is a Delaware corporation registered to do business in Louisiana. POSSI was formed to manage SPR sites for the DOE and the Department of Defense (DOD). It managed SPR sites for the DOE in Louisiana and for the DOD in various locations throughout the country.

POSSI subcontracted for security guards at the Weeks Island, Louisiana, SPR site and the subcontractor employed Grinter as a security guard at that location. She alleges that she severely injured her back while on duty at the Weeks Island site. In her original complaint, she sued the DOE, POSSI and others. For her claim against the DOE, she alleged jurisdiction under the Federal Tort Claims Act (FTCA). Jurisdiction of her actions against the other defendants was grounded on diversity of citizenship.

POSSI's contract with the DOE required POSSI to maintain a Louisiana office for management of the DOE contracts. In 1983, POSSI moved its corporate office to Metairie, Loui-

siana, and made it responsible for the DOE contracts. The majority of POSSI's employees live and work in Louisiana. Most of POSSI's operations are conducted in Louisiana: POSSI's Louisiana DOE contracts total $225,000,000; its out-of-state DOD contracts total $6,000,000. The majority of all property, movable and immovable, leased or owned by POSSI is located in Louisiana.

When this suit was filed, a Houston-based conglomerate, Kaneb Services, Inc., owned 83% of the stock of POSSI. Executives in Kaneb's Houston office made many of POSSI's key decisions. Another Kaneb subsidiary in Houston, PLT Engineering, performed marketing functions for POSSI. Some accounting, payroll, and employee benefit services were performed in Houston. Staff counsel in Kaneb's Houston office provided legal services for POSSI.

Because Grinter failed to exhaust administrative remedies as required by the FTCA, the district court dismissed her suit against the DOE for lack of subject matter jurisdiction. After discovery and a hearing, the district court determined that POSSI is domiciled in Louisiana and therefore the court had no diversity jurisdiction over POSSI because, after the DOE was dismissed, no substantial federal question existed to which Grinter's state-law claim could pend.

On appeal, Grinter asserts error in the district court's conclusions that: (1) POSSI is a Louisiana citizen; (2) the court lacked power to exercise pendent party jurisdiction over Grinter's state law claim against POSSI.

II.

A.

The district court determined that POSSI's principal place of business is in Louisiana and therefor it is considered a citizen

of Louisiana. We will not disturb that determination unless it is clearly erroneous. *J.A. Olson v. City of Winona,* 818 F.2d 401, 411 (5th Cir. 1987). It is not.

The circuit applies a 'total activity' test to determine the principal place of business of a corporation involved in multi-state activities. *J.A. Olson Co.*, 818 F.2d at 404; *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313, 315 (5th Cir. 1980); *Village Fair Shopping Center v. Sam Broadhead Trust,* 588 F.2d 431 (5th Cir. 1979). The total activity test requires the court to consider both the location of POSSI's 'nerve center' and of POSSI's ''place of activities.'' *J.A. Olson Co.*, 818 F.2d at 404; *Toms,* 610 F.2d at 315. The district court must then balance all of the facts of the case to determine the corporation's principal place of business. *J.A. Olson Co.*, 818 F.2d at 409-10.

Although personnel in Kaneb's Houston office made some executive decisions, POSSI's employees based in its corporate headquarters in Metairie, Louisiana, had significant autonomy and made many of the company's managerial decisions. The autonomy of the Metairie office distinguishes this case from *Toms.* See *J.A. Olson Co.*, 818 F.2d at 412.

In applying the 'place of activities' test, the district court determined that: the majority of POSSI's employees live and work in Louisiana; the majority of its property is in Louisiana; and the overwhelming majority of its operations are conducted in Louisiana. Each of these factors is significant in determining a corporation's place of activities. *J.A. Olson Co.*, 818 F.2d at 411. When a corporation's physical operations are concentrated in one state, the place of operations is frequently determinative of the corporation's principal place of business. See id. at 409; 1 Moore Federal Practice 0.77 [3.—4].

In this case, the evidence fully supports the district court's finding that both the place of activity and nerve center tests weigh in favor of Louisiana. Thus, the district court's finding

that Louisiana is POSSI's principal place of business is not clearly erroneous.

Grinter next argues that the district court erred when it concluded that the dismissal of her FTCA action deprived it of the power to hear her claim against POSSI.

A federal court has the power and thus the discretion to exercise pendent jurisdiction over state-law claims if (1) the fact of the complaint reveals that the Court has jurisdiction over a substantial federal question to which the state claim may pend and (2) the state and federal claims derive from a common nucleus of operative fact. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Ingram Corp. v. J. Ray McDermott & Co., Inc.,* 698 F.2d 1295, 1318 (5th Cir. 1983); see also Wright, Miller & Cooper, *Federal Practice and Procedure,* Section 3567.1, at 114 (1984). A federal claim is substantial, i.e. sufficient to confer subject matter jurisdiction on a federal court, unless it is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous." *Hood,* 327 U.S. at 682-83, 66 S.Ct. at 776. Whether the federal claim is substantial should ordinarily be decided on the basis of the plaintiff's complaint. See, e.g., *Hagans v. Lavine,* 415 U.S. 528, 538, 94 S.Ct. 1372, 1379-80, 39 L.ED.2d 577 (1974); *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *Green v. Ferrell,* 664 F.2d 1292, 1294 (5th Cir. 1982); Wright, Miller & Cooper, *Federal Practice and Procedure,* Section 3564 (1984). Grinter's complaint on its face stated a nonfrivolous FTCA claim; her complaint therefore presented a substantial federal question. It is undisputed that Grinter's state and federal claims derive from a common nucleus of operative fact. The district court was therefore required to exercise its discretion and determine whether it should retain jurisdiction over the pendent state-law claim. Because the district court apparently concluded that it was required to dismiss the pendent claim, we vacate its dismissal and remand this case to the district court to exercise

its discretion on whether it will retain jurisdiction of the state law claim.

AFFIRMED in part.

VACATED in part and REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-4338

SHARON LEA GRINTER,
Plaintiff-Appellant,

NATIONAL UNION FIRE INSURANCE COMPANY,
Intervenor-Appellant,

versus

PETROLEUM OPERATION SUPPORT SERVICE, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(July 15, 1988)

Before GARZA, REAVLEY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied. The mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-4338

SHARON LEA GRINTER,
Plaintiff-Appellant,

NATIONAL UNION FIRE INSURANCE COMPANY,
Intervenor-Appellant,

versus

PETROLEUM OPERATION SUPPORT SERVICE, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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ORDER:

X__ The motion of Appellee for _____stay X recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

__ The motion of _____ for __ stay X recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The

Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

____ The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

____ The motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ W. Eugene Davis

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

SHARON LEA GRINTER — CIVIL ACTION
PLAINTIFF

VERSUS — NO. 84-1278

PETROLEUM OPERATION SUPPORT SERVICES, INC. — SECTION "O"
DEFENDANT

O P I N I O N

On June 9, 1988, the Court of Appeals for the Fifth Circuit remanded this case back to this court so the court could exercise its discretion on whether it will retain jurisdiction of the state law claim which is presently before the court. The court had originally believed that it was required to dismiss plaintiff's state law claim upon dismissal of the federal claim. The Fifth Circuit, however, found that this court had discretion to determine whether the court should retain jurisdiction over plaintiff's pendent state law claim.

The court finds that it would not be an abuse of its discretion to dismiss plaintiff's pendent state claim without prejudice. Admittedly, plaintiff's state and federal claims derive from a common nucleus of operative fact. Nevertheless, because plaintiff's federal claim has already been dismissed, the court finds that to entertain a purely state matter in a federal court would not constitute the best use of the federal judiciary's resources.

The court further notes that because plaintiff filed her claim in this court within the one-year prescriptive period, the statute of limitations has been tolled, and plaintiff may properly file her pendent state claim in state court, notwithstanding the fact that one year has passed since the date of the accident. La. Civil Code Art. 3462; *LaFargue v. O'St. Amant*, 433 So.2d 1061 (La. App. 5th Cir. 1982); *Hidalgo v. Dupuy*, 122 So. 2d 639 (La. App. 1st Cir. 1960).

In conclusion, the court, in the exercise of its discretion, hereby dismisses without prejudice all of plaintiff, Sharon Grinter's pendent state law claims.

Opelousas, Louisiana, July 26, 1988.

/s/JOHN M. SHAW

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

SHARON LEA GRINTER PLAINTIFF	CIVIL ACTION
VERSUS	NO. 84-1278
PETROLEUM OPERATION SUPPORT SERVICES, INC. DEFENDANT	SECTION "O"

JUDGMENT

This remand from the United States Court of Appeals for the Fifth Circuit came on before the court, United States District Judge John M. Shaw presiding, and the issues having been duly heard and an opinion having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that all of plaintiff, Sharon Lea Grinter's pendent state claims are dismissed without prejudice, and this case may be closed.

Opelousas, Louisiana, July 26, 1988.

/s/ JOHN M. SHAW

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different Sates, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places

as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX "F"

28 U.S.C. SECTION 1331 — FEDERAL QUESTION; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set-off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

APPENDIX "G"

28 U.S.C. SECTION 1346 — UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal- revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of any executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tor, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in Section 6226, 6228(a), 7426, or 7428 (in the case of the United States District Court for the District of Columbia) or Section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

APPENDIX "H"

28 U.S.C. SECTION 2675 — DISPOSITION BY FEDERAL AGENCY AS PREQUISITE; EVIDENCE

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim or purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.